

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

David M. Wambolt, :  
Plaintiff, :  
: :  
v. : File No. 2:07-CV-167  
: :  
State's Attorney of :  
Chittenden County, :  
Defendant. : :

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
(Paper 17)

Plaintiff David Wambolt, a Vermont inmate proceeding *pro se*, initiated this action seeking DNA testing of certain evidence. He now moves to dismiss the case without prejudice because he is "not in the position to bring this to court at this present time." (Paper 17). The defendant informs the Court that he has no objection to such dismissal. (Paper 20).

The Second Circuit has held that courts should consider a series of factors when deciding whether to grant a voluntary dismissal without prejudice, including: the plaintiff's diligence in bringing the motion; any undue vexatiousness on the part of the plaintiff; the extent to which the suit has progressed; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss. Zagano v. Fordham Univ., 900 F.2d

12, 14 (2d Cir. 1990. Here, Wambolt was reasonably diligent in bringing his motion, which was filed nearly one month after his request for appointed counsel was denied. There is no evidence of undue vexatiousness, discovery has not yet commenced, and the Court accepts Wambolt's representation that he is not prepared to move forward at this time. In light of these findings, and the fact that the motion is unopposed, I recommend that Wambolt's motion to dismiss (Paper 17) be GRANTED, and that this case be DISMISSED without prejudice.

Dated at Burlington, in the District of Vermont, this 14<sup>th</sup> day of May, 2008.

/s/ Jerome J. Niedermeier

Jerome J. Niedermeier

United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).